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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SPAP COMPANY, LLC, Plaintiff and Respondent, v. CLINICAL PRODUCTS, LLC, Defendant and Appellant.	B282405 Los Angeles County Super. Ct. No. BC538948
SPAP COMPANY, LLC, Plaintiff and Appellant, v. CLINICAL PRODUCTS, LLC, Defendant and Respondent.	B283120 Los Angeles County Super. Ct. No. BC538948

APPEALS from a judgment and postjudgment order of the Superior Court of Los Angeles County, James A. Kaddo, Judge. Affirmed.

Chad Biggins for Plaintiff and Respondent in No. B282405; for Plaintiff and Appellant in B283120.

Randall A. Spencer for Defendant and Appellant in No. B282405; for Defendant and Respondent in B283120.

INTRODUCTION

This appeal arises from a $317,512 judgment against Clinical Products, LLC (Clinical) after a jury returned a verdict in favor of SPAP Company, LLC (SPAP) on its breach of contract claim against Clinical. Clinical contends the judgment must be reversed because the trial court erred when it did not give Clinical's proposed condition precedent jury instruction and made a comment about Clinical's expert witness in front of the jury. SPAP appeals from the trial court's order denying its motion for attorney fees as the prevailing party in the litigation. We affirm both the judgment and the order denying attorney fees.

FACTS AND PROCEDURAL BACKGROUND

1. *The contract*

Jeff Henderson is the manager and sole employee of SPAP. SPAP is an independent international manufacturer's representative, focusing on health, medical, life science, aesthetics, and veterinarian products. Clinical manufactures various products, including a nutrition bar that helps diabetics stabilize their blood sugar for up to nine hours.

Henderson was impressed with Clinical's product, and Clinical wanted Henderson's help to sell its products internationally. SPAP and Clinical entered an International Manufacturer's Representative Promotion & Marketing & Sales Liaison Agreement on January 8, 2007 (Agreement). At the time,

Vijay Chauhan was the president of Clinical. Kevin Dalrymple became Clinical's president in January 2012. He was a consultant for Clinical before that time.

Under the Agreement, SPAP was to promote and market Clinical's products internationally, focusing on its food items, introduce Clinical to international customers, and then act as the liaison between Clinical and these international customers. SPAP would then receive a commission on all Clinical's sales to customers SPAP located.

Because Clinical also was promoting its products on its own "into certain foreign countries," under section 2 of the Agreement the parties agreed SPAP would "query [Clinical] by e-mail as to whether or not [Clinical] is active in a certain country. [Clinical's] e-mail response will dictate which companies in which countries SPAP will be declaring using the sequences listed below in Exhibit A." "Exhibit A" to the Agreement in turn provides that Clinical

> "appoints SPAP as exclusive promotion, marketing and liaising representative for the foreign customers that will eventually be listed below in a virtual Exhibit A. SPAP will identify the companies by sending a separate e-mail to [Clinical] confirming that formal contact has been made and that the customer or customers are requesting [Clinical] to mail brochures, support material and/or samples to their offices. [¶] These notifications from SPAP to [Clinical] will constitute the record of the companies to be added to Exhibit A. [¶] For the purposes of Section 4, Section 5 and Section 6 of

> this Agreement, the compensation terms of the customer/manufacturer agreements are listed above." (Block capitals omitted.)

Section 6 of the Agreement governs SPAP's commission. It provides that "[f]or all sales transactions resulting from any activities performed under this Agreement, SPAP shall be paid as a commission the sum of ten (10%) percent of the net invoice for sales to SPAP customers. Net invoice shall be defined as gross sales price less the cost of shipping, insurance or any taxes levied hereon." That section limits SPAP's duties "to those activities set forth in 2b above," but there is no such section.[1]

Clinical agreed to pay SPAP "commissions for the full lifetime of the customer's program or product in which [Clinical's] products are being purchased." The Agreement's term was thus for the "length of the program and/or the length of the product," or a "LOP-LOP agreement." SPAP's compensation ceases under the Agreement on a customer-by-customer basis when "a particular customer no longer purchases any products or licenses from [Clinical]."

The Agreement also has an arbitration provision. Section 14—titled "ARBITRATION"—states: "In the event of a dispute, the parties agree to submit the matter to binding arbitration which shall be held in Los Angeles County, California. . . . Each party agrees to initially pay one-half of the cost of arbitration and the prevailing party shall be awarded attorney's fees and costs."

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[1] There is, however, a section 3(b) that states, "SPAP duties shall be limited to the promoting, marketing and rep liaising of [Clinical] products (as described in paragraphs 4, 5, and 6 below)."

2. *Events giving rise to SPAP's lawsuit*

Beginning in 2007, Clinical sent "trade leads" to Henderson for him to contact on its behalf. Henderson also located customers for Clinical's products on his own and introduced Clinical's products to SPAP's preexisting customers. Henderson sent emails to Clinical labeled "Exhibit A/CP LLC" to identify those companies he had contacted about distributing Clinical's products. If Clinical did not respond that the identified companies were Clinical customers already, Henderson virtually added them to Exhibit A, as evidenced by his original email to Clinical.

On June 25, 2007, Henderson sent such an email to Chauhan identifying four international companies, including Atari in Mexico, that Henderson had contacted about selling Clinical's products. On March 3, 2008, Henderson sent another Exhibit A email to Chauhan identifying the Canadian company Auto Control Medical (ACM) as a customer he had contacted who was interested in Clinical's products. Henderson did not email Clinical before contacting the customers identified in his 2007 and 2008 emails. Until 2012, Clinical paid Henderson commissions on sales it made to the customers SPAP contacted, including on products sold to ACM.[2] Sales to ACM generated the most commissions for SPAP.

After initially contacting Atari, Henderson followed up by phone and email, but Clinical did not make a sale to Atari until 2012. Clinical did not pay SPAP a commission for the sale,

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[2] Dalrymple did not agree that ACM was an SPAP customer. He testified Clinical "mistakenly paid" SPAP commissions on ACM sales.

however, because it contended Atari was its own customer, not a commissionable SPAP customer. In April 2012, Dalrymple told Henderson not to contact Atari. Dalrymple and Henderson communicated about the issue over the phone and by email until the fall of 2012.

In October 2012, Dalrymple proposed Clinical and SPAP terminate the Agreement and enter into a new agreement. He proposed that SPAP would be paid a 10 percent commission on sales to international distributors the parties agreed were SPAP customers, except that SPAP would receive a 5 percent commission on current product sales placed with ACM, but not on any future products.[3] Dalrymple did not list Atari as an SPAP customer. Dalrymple also proposed commissions be limited to current product distributed to customers for one year from a termination of a contract with the customer, rather than the current LOP-LOP term. Henderson rejected the proposal.

Clinical terminated the Agreement for cause on July 29, 2013, based on six grounds: "negative track record of sales growth"; "negative track record of locating the correct [i]nternational distribution partners"; "[r]efusal to provide Exhibit A customer outreach list, as documented in agreement, more than 2 years after requested"; "[r]efusing to request pre-approval, as in set [*sic*] agreement, prior to outreach to new [i]nternational distributors"; "continued outreach to new accounts after being instructed . . . to refrain" from doing so; and "[o]verall strange business behavior that adversely effects [*sic*] all aspects of the business."

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[3] Sales to ACM had declined due to a Canadian regulatory issue. (See note 9 *post*.)

SPAP filed a complaint against Clinical for breach of contract and quantum meruit on March 11, 2014, to recover unpaid past and lost future commissions.

3. *Jury trial and attorney fees motion*[4]

Before trial, the court determined the Agreement was unambiguous and ruled it would not allow extrinsic evidence to modify or amend its terms. A jury trial was held February 8-9, and 14, 2017. Henderson, Dalrymple, SPAP's expert witness, and Clinical's expert witness testified. After deliberating for an hour, the jury reached a unanimous verdict in favor of SPAP for $317,512 on its breach of contract claim.[5] Notice of entry of judgment was filed March 9, 2017. Clinical timely appealed from the judgment on May 3, 2017.

On April 19, 2017, SPAP moved for attorney fees as the prevailing party on the Agreement. On June 16, 2017, the trial court denied SPAP's motion finding the Agreement's attorney fee provision applied to arbitration proceedings, not court proceedings. SPAP timely appealed from the order on June 13, 2017.

On October 19, 2018, we consolidated the two appeals for purposes of argument and decision.

DISCUSSION

Clinical assigns two errors to the trial court that it argues mandates reversal of the judgment. It contends the court improperly refused its proposed jury instruction in support of its argument that SPAP failed to comply with a condition precedent

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[4] We discuss details from the trial below.

[5] SPAP withdrew its quantum meruit claim.

to Clinical's obligation to pay SPAP commissions—SPAP's failure to "properly" add customers to Exhibit A. Clinical also contends the court's comment during Clinical's expert accountant's testimony that the court hoped he "do[es]n't do my tax returns" destroyed its expert's credibility with the jury.

SPAP contends the court erred when it found the Agreement's attorney fee provision applied only to arbitration proceedings.

1. *No prejudicial error occurred at trial*

a. *There was no instructional error*

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) Instructional error does not mandate reversal, however, unless "it is probable the error prejudicially affected the verdict." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) "In determining whether instructional error was prejudicial, a reviewing court must evaluate '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Ibid.*, quoting *Soule,* at pp. 580-581.) Nonetheless, " '[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given.' " (*Major*, at p. 1217.)

Clinical requested the following jury instruction based on CACI No. 321, "Existence of Condition Precedent Disputed":

> "Clinical Products claims that the contract with SPAP provides that it was not required to pay commissions to SPAP unless Clinical Products

> made sales to customers who were properly added to Exhibit A to the parties' contract.
>
> "Clinical Products must prove that the parties agreed to this condition. If Clinical Products proves this, then SPAP must prove that Clinical Products sold products to customers who were properly added to Exhibit A to the parties' contract.
>
> "If SPAP does not prove that Clinical Products sold products to customers who were properly added to Exhibit A to the parties' contract, then Clinical Products was not required to pay commissions to SPAP."

SPAP objected to the instruction on the ground nothing in the Agreement required a condition precedent. The court rejected the instruction "because the contract is the controlling instrument between the parties, and the jurors have already been given instructions as to what the contract means." The court explained the Agreement "doesn't specifically say that as a condition precedent, so you're adding specific language to modify the contract and interfering with the jury's finding as to what does the contract mean." The court concluded, "The contract speaks for itself, and the jurors have been given instructions to cover the meaning of the contract."

Clinical argued it was not trying to modify the contract but to "essentially summarize[e] what the clauses in the contract mean[ ]." The court clarified Clinical could argue that in its closing argument.

During the trial, Clinical argued SPAP failed to follow the procedural requirements for placing a customer on Exhibit A, which it contended was a condition precedent to paying SPAP commissions on any sales. Essentially, Clinical argued section 2 of the Agreement required SPAP first to "query" Clinical before contacting any customer and because Henderson did not do so, those customers, including ACM and Atari, had not been added properly to the virtual Exhibit A. It also argued Henderson never provided his Exhibit A list of customers to Clinical.

But, as SPAP argued, section 2 does not state querying Clinical first, or waiting to receive a response from Clinical before contacting a customer, is a condition precedent to Clinical's obligation to pay SPAP commissions. Rather, section 6 of the Agreement provides Clinical "shall . . . pa[y]" SPAP a 10 percent commission for sales to SPAP customers. The Agreement also states the procedure to virtually add a customer to Exhibit A: by an email to Clinical, SPAP was to identify companies it had formally contacted, and confirm in the email that the customer was requesting materials from Clinical. Henderson presented evidence he did so.

Conditions precedent generally are disfavored; " 'courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.' " (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1183.) Given the contract's plain language, the court did not err in refusing the instruction. By the terms of the agreement, Clinical owed SPAP commissions only on sales Clinical made to SPAP customers—customers SPAP added to the virtual Exhibit A. But nothing in the contract stated SPAP

would forfeit those commissions if it did not precisely follow the procedure set out in section 2.

Moreover, whether SPAP had fulfilled the terms of the contract to require Clinical to pay it commissions was covered by other jury instructions. The court instructed the jury,[6] as requested by both SPAP and Clinical:

> "To recover damages from [Clinical] for breach of contract, SPAP must prove all of the following:
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> 1. That SPAP and [Clinical] entered into a contract;
> 2. That SPAP did all, or substantially all, of the significant things that the contract required it to do; or
>
> [text crossed out]
>
> 3. That all conditions required by the contract for [Clinical's] performance [occurred]; or
> 4. That [Clinical] failed to do something that the contract required it to do; or
> [5.] That [Clinical] did something that the contract prohibited it from doing; and
> [6.] That SPAP was harmed by [Clinical's] breach of contract."

The jury thus was instructed that for SPAP to recover it had to have performed its obligations and that all conditions required for Clinical's performance had to have occurred.

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[6] The parties waived the reporter's taking down the court's reading of the instructions to the jury.

The court also instructed the jury—again, as requested by both SPAP and Clinical—that "[i]n deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together." The jury therefore knew it was to consider section 2, section 6, and the Exhibit A procedures together, along with the other contract provisions, in determining what the Agreement required of the parties.

Clinical also has not demonstrated it was prejudiced by any purported instructional error. Henderson testified he did not contact Clinical before reaching out to Atari and ACM, among other customers. But, he also testified he sent emails to Clinical that he had contacted those companies under the Exhibit A provisions. When Clinical did not respond to tell him those companies already were Clinical customers, he said they virtually were added to Exhibit A. He followed this procedure for all customers he introduced to Clinical, other than trade leads Clinical gave him. He testified Clinical had paid him commissions on products sold to ACM from 2008 until 2013. Dalrymple in contrast testified the commissions on ACM sales were made "by accident" or "mistakenly paid."

Dalrymple also testified that he had asked Henderson for the list of customers on Exhibit A for two and a half years and Henderson never complied.[7] Henderson testified that testimony

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[7] Dalrymple testified Clinical's former president had been indicted, and the federal government had taken Clinical's laptops and hard drives. When they were returned, many were corrupted resulting in lost data.

was "a lie." He said Dalrymple asked him for a copy of the contract in 2011, but did not ask for a list of SPAP's Exhibit A customers until after Clinical "stole Atari in Mexico" in 2012. Henderson explained he did not provide a list because he feared Clinical would make those customers "in house" accounts as it had with Atari.

Although the evidence conflicted, based on the trial testimony, we can infer the jury concluded SPAP substantially complied with the provisions to add customers, including ACM and Atari, to Exhibit A and that Clinical therefore was required to pay commissions on sales of its products to those customers. We also can infer the jury found Henderson more credible than Dalrymple. As Henderson's testimony was not " ' "unbelievable per se," ' " we defer to the jury's implied credibility finding. (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

We also cannot say SPAP's argument misled the jury. SPAP's counsel argued Clinical owed SPAP commissions on sales to customers it had introduced to Clinical regardless of their Exhibit A status. But, the jury also had heard argument from Clinical's counsel that SPAP had not added customers to Exhibit A in the manner required by the Agreement and had not produced Exhibit A. She argued, "The contract, again, states that no commissions should be paid to SPAP unless Clinical Products made sales to customers who were properly added to Exhibit A. No such customers exist, once again." She continued, "There are conditions that needed to be met by SPAP before SPAP would be entitled to any commissions by Clinical Products. Those conditions were not met. No customers were added to Exhibit A."

As we have said, the court instructed the jury that it was to consider whether SPAP had fulfilled its obligations under the contract and whether all conditions to Clinical's performance had occurred. Finally, the jury never requested a rereading of the instructions and never asked any questions. Indeed, it needed only an hour to reach its unanimous verdict. Even if the jury had been instructed as Clinical requested, we do not find it probable that the jury would have reached a different result. Rather, it likely would have concluded SPAP "properly added" its customers to Exhibit A and that Atari and ACM were among them.

b. *The trial court's comment did not prejudice Clinical*

During the trial, SPAP and Clinical presented competing damages experts who calculated commissions owed to SPAP.[8] SPAP's expert calculated its damages in accrued and future commissions plus prejudgment interest as between $311,751 and $1,020,331, depending on how many years into the future one assumed sales of Clinical products to SPAP customers would continue. Clinical's expert calculated commissions owed to SPAP to date and in the future as totaling $119,694.

During Clinical's expert's testimony, while he was trying to direct the court to different pages of his unstapled, 60-page exhibit, the court said "hope you don't do my tax returns." Clinical contends this comment "destroyed" the witness's credibility and "created the impression that he lacked competence and that his opinions were unreliable." Clinical argues the judge's comment violated the Standards of Judicial Conduct that

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[8] Clinical argued it owed no commissions to SPAP at all, but it introduced its expert's damages analysis in the event the jury found commissions were owed.

require trial judges to " 'be judicial, impartial and open-minded with respect to the issues, evidence, parties, witnesses and counsel,' " and that their " 'manner should be temperate and courteous.' "

Generally, "judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial." (*People v Sturm* (2006) 37 Cal.4th 1218, 1237 (*Sturm*).) Clinical never objected to the trial court's comment. It could have objected and asked the court at a sidebar to instruct the jury that its comment did not reflect any view about the expert's competency and to disregard it, but it did not. Clinical thus has forfeited the issue on appeal. We are not persuaded by Clinical's position that an objection and admonition would not have cured any purported prejudicial effect the comment may have had on the jury. (*Ibid.* ["failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct or when objecting would be futile"].) Clinical has articulated no reason why an admonition would not have cured any potential prejudicial effect other than to state "the comment of the trial court tipped the scales in favor of SPAP."

Clinical's forfeiture aside, we do not find the court engaged in prejudicial misconduct. As SPAP notes, the trial court made joking comments to and became frustrated with witnesses and attorneys on both sides throughout the trial. For example, when SPAP's expert testified he was not familiar with the description of an invoice labeled "packaging," the court responded, "Well, you can read English, can you not?" The court also chastised SPAP's expert for inviting the jury to do something and for asking

counsel a question, telling him, "She's here to ask you a question, and you are here to answer [it]."

"When 'the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment[s] from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary.' " (*Sturm, supra*, 37 Cal.4th at pp. 1233, 1238 [misconduct where trial judge "engaged in a pattern of disparaging defense counsel and defense witnesses in the presence of the jury, and conveyed the impression that he favored the prosecution by frequently interposing objections to defense counsel's questions"].) We do not find the trial court's offhand comment to Clinical's expert as signaling an opinion that he was not competent or less competent than SPAP's expert, that the court was biased against Clinical's expert, or that the expert was not credible. The court's comment clearly arose from its frustration that the lengthy exhibit had not been marked and paginated ahead of time. He did not comment on the substance of the expert's report or his testimony. This single, stray comment thus did not constitute misconduct.

Nor does the record support a finding of prejudice. The jury could have found Clinical's expert less persuasive based on his lesser experience. Clinical's expert witness had never testified before and had graduated from college with a degree in accounting and economics and begun working as a consultant only nine years earlier. SPAP's expert, on the other hand, obtained his accounting degree in 1970 and has been a licensed CPA engaged in forensic accounting since 1982. He has several

additional certifications and a master's in financial forensics and had testified as an expert witness between 50 and 100 times.

Without getting into the details of the bases for each expert's opinion, the jury could have found less credible Clinical's expert's methodology relating to future commissions. Both experts concluded Clinical owed SPAP for commissions it had not paid in the past. Clinical's expert calculated commissions owed to date at $90,572 while SPAP's expert calculated unpaid commissions from historical sales at only $11,000 more, $101,543.

As to future commissions, however, Clinical's expert applied a negative growth rate, predominately based on the decline in sales to ACM over the past few years, and Dalrymple's representation that ACM sales could cease entirely in the next year.[9] He also relied on Dalrymple's representation that future sales either were not anticipated or would decrease significantly to other customers. SPAP's expert on the other hand took the historical average of sales to SPAP customers, including ACM,

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[9] The jury heard testimony that ACM sales had decreased due to regulatory issues in Canada, but that those regulatory issues had been resolved in 2016. Dalrymple testified the regulatory issues were not resolved then, but on February 1, 2016, he sent an email to ACM that said, "It was great catching up on business and discussing a move-forward plan. It is great to finally come out from under the regulatory hurdles that have held us back." Dalrymple said it took until September 2016 to get clearance. Clinical's expert testified he assumed the regulatory hurdle "in some way will be overcome," but believed the general business environment also impacted sales. He based that assumption on the trend in Clinical's sales to ACM and to other clients and his discussions with Dalrymple.

increased it by 17 percent after determining Clinical had underreported sales based on his review of the available records, and then assumed those sales would grow at the same rate that diabetes was projected to grow, 3.71 percent. He took the average of the ACM sales, rather than assuming sales would continue to decline, because a regulatory issue that had hindered sales had been resolved in February 2016. The jury calculated damages at the lower end of the range provided by SPAP's expert.[10]

Based on the evidence, we cannot conclude it probable that if the court had not made the comment the jury would have accepted Clinical's expert's report over SPAP's expert's and found SPAP damaged by a lesser amount. Nor do we find " 'the court's comment[ ] would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal.' " (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1008.)

2. *The trial court properly denied SPAP's motion for attorney fees*

Civil Code section 1717 authorizes the award of attorney fees to a prevailing party "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to

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[10] We also note that at the close of evidence, the court instructed the jury, "In reaching your verdict, do not guess what I think your verdict should be from something I might have said or done." The court gave a similar instruction at the beginning of trial.

one of the parties or to the prevailing party." (Civ. Code, § 1717, subd. (a).) As with any contract, "an agreement for the payment of attorney fees must be interpreted in accordance with its terms." (*Kalai v. Gray* (2003) 109 Cal.App.4th 768, 771 (*Kalai*); see also Civ. Code, § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."]; Civ. Code, § 1639 ["the intention of the parties is to be ascertained from the writing alone, if possible"].) We must consider the fee provision in context, rather than in isolation, and in light of the Agreement as a whole. (Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."].) Because our resolution of this issue turns on the interpretation of a contract without the aid of extrinsic evidence, we review the ruling de novo. (*Kalai,* at p. 777.)

The attorney fee clause at issue is contained in the Agreement's provision calling for arbitration of disputes. The provision is entitled, "Arbitration," and the first sentence states, "In the event of a dispute, the parties agree to submit the matter to binding arbitration which shall be held in Los Angeles County, California." The sentence containing the attorney fee clause comes at the end of that provision and provides, "Each party agrees to initially pay one-half of the cost of arbitration and the prevailing party shall be awarded attorney's fees and costs." SPAP contends this clause awards attorney fees to the prevailing party to any suit—arbitration or court. Clinical contends the clause is limited to the prevailing party to an arbitration.

Both parties rely on *Kalai,* so we spend some time describing the facts of that case. There, the contract at issue

between a homeowner and contractor provided for an arbitration provision with attorney fees awarded to the prevailing party. (*Kalai, supra*, 109 Cal.App.4th at p. 771.) The portion of the arbitration provision relating to attorney fees provided, " 'The administrative costs of the [a]rbitration proceedings shall initially be borne by the party requesting the [a]rbitration. The prevailing party to such [a]rbitration proceedings, should there be a prevailing party, shall be entitled to recover from the other all reasonable attorney's fees and costs incurred by said prevailing party in connection with the [a]rbitration proceedings.' " (*Ibid.*)

The homeowner sued the contractor in court instead of initiating arbitration. (*Kalai, supra*, 109 Cal.App.4th at p. 772.) The contractor moved for summary judgment on the ground the homeowner failed to submit the parties' dispute to arbitration. (*Ibid.*) The trial court granted the motion, finding the homeowner essentially had failed to exhaust his administrative remedies by not filing for arbitration first. (*Ibid.*) The contractor moved for attorney fees as the prevailing party in the litigation and the trial court granted the motion. (*Id.* at pp. 772-773.) The Court of Appeal reversed the fee award, finding it was premature because the fee provision awarded fees only to the prevailing party to an arbitration and no arbitration had occurred yet. (*Id.* at p. 777.)

SPAP distinguishes the clause here from that at issue in *Kalai*. SPAP contends that because the Agreement's fee provision does not limit an award of attorney fees to an arbitration proceeding, like that in *Kalai*, the prevailing party in a court proceeding also is entitled to attorney fees. SPAP would have us isolate the attorney fee clause from not only the rest of

the provision in which it is contained but from the first half of the sentence in which the clause is found. But we construe a contract "as an entirety, the intention being gathered from the whole instrument, taking it by its four corners. Every part thereof should be given some effect." (*Ogburn v. Travelers' Ins. Co.* (1929) 207 Cal. 50, 52-53 (*Ogburn*).)

Reading the fee clause in context, we find Clinical's interpretation the better one. As SPAP notes, the fee clause here does not specifically state the prevailing party in an arbitration proceeding shall be awarded attorney fees. Construing the clause together with the rest of the sentence and provision, however, we conclude the attorney fee clause is intended to limit attorney fees to the prevailing party in an arbitration proceeding (or perhaps a court proceeding related to an arbitration).

We agree with Clinical's interpretation of the sentence as allocating the costs of arbitration between the parties. The first half of the sentence allocates the initial cost of arbitration equally between the parties and the second half of the sentence allows for recovery of those costs and attorney fees by the prevailing party. Had the parties intended for attorney fees to be recoverable in any forum, they easily could have provided for the recovery of attorney fees in a separate sentence or referred to the prevailing party "in any proceeding" as able to recover attorney fees. Instead, the award of attorney fees and costs to the prevailing party is referred to in conjunction with the initial payment of the cost of arbitration by both parties. We thus do not consider

limiting the recovery of fees to those incurred in arbitration as inserting a term omitted from the Agreement as SPAP argues.[11]

This interpretation is bolstered by the placement of the fee clause in the provision—a single paragraph—governing the parties' agreement to submit disputes to arbitration. And, the heading itself refers to arbitration only, rather than arbitration and attorney fees. (See *Ogburn, supra*, 207 Cal. at pp. 52-53 [considering entire insurance policy including introductory clause or caption to interpret intended coverage].)

We also disagree with SPAP's contention that the parties' mutual request for fees in their pleadings demonstrates their intent that the prevailing party recover attorney fees even when the parties have waived arbitration. The parties' respective pleadings do not create an independent basis for the recovery of attorney fees. (*Blickman Turkus LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 899 [award of attorney fees to a party not justified "merely because his opponent asked for them"].) To be entitled to attorney fees based on its opponent's prayer for them, the party must prove its opponent would have been entitled to fees if the opponent had prevailed. (*Id.* at p. 898; see also *Hasler v. Howard* (2005) 130 Cal.App.4th 1168, 1171 ["A prevailing party is not entitled to fees simply because the opposing party requested them."].) Based on our interpretation

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[11] Moreover, if the recovery of attorney fees was not limited to arbitration proceedings, the reference to the award of *costs* to the prevailing party, in addition to attorney fees, would be unnecessary. Costs already are available to the prevailing party in court proceedings as a matter of right by statute. (Code Civ. Proc., § 1032, subd. (b).)

of the attorney fee clause, Clinical also would not have been entitled to recover fees if it had been the prevailing party.

Finally, SPAP contends that the *Kalai* court "affirmed that the prevailing party would be entitled to fees both in arbitration as well as in litigation." SPAP misconstrues *Kalai*. The court explained that if the defendant prevailed on the merits in the arbitration proceeding, he would be able to recover fees incurred in court proceedings *related to the arbitration*—in other words, the successful proceeding to compel arbitration. (*Kalai, supra*, 109 Cal.App.4th at p. 777 [fee provision includes those incurred by party prevailing in arbitration " '*in connection with* the [a]rbitration proceedings' "].) The court did not affirm that the party prevailing on the merits of an action in a court proceeding, rather than an arbitration proceeding, would be entitled to attorney fees under the contract. The court did not reach that question. (*Id.* at p. 778.)

DISPOSITION

The judgment and order of the trial court are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P.J.

LAVIN, J.